in the State courts to enforce a license tax by penalties, as provided by an alleged unconstitutional statute. The case was correctly distinguished from that class of authorities to which *Reagan* v. *Farmers' Loan & Trust Company, supra,* belongs, where the State attorneys were restrained. In the latter case, the object of the statute was to benefit the shippers through rates established by the commission; in the principal case, to benefit the State in its financial capacity. *Western Union Telephone Co.* v. *Andrews* (1907) 154 Fed. 95.

Another vital interest of the State is in the discretion of her officers. A Federal court will not substitute its discretion for that of a State officer. *Louisiana* v. *Jumel, supra; Fitts* v. *McGhee, supra.* In the Fitts case is made prominent a statement that an officer may be restrained if specially charged by the statute to do the act in question, but not if merely likely to take action because he is a State officer. This principle is used in the case as a means of distinguishing previous cases, but is so incorporated with the personal tort idea as to make its existence as a distinct principle doubtful. It is not within the discretion principle, and is difficult to support. The actual result of the decisions is that a State Board or Commission to establish railroad rates may be restrained from in any way enforcing rates repugnant to the 14th Amendment, including suits by the State Attorney General as a member of the board or as counsel specially charged. *Reagan* v. *Farmers' Loan & Trust Co., supra;* cf. *Smyth* v. *Ames* (1898) 169 U. S. 466; *Prout* v. *Starr* (1903) 188 U. S. 537, 544.

The decisions may be supported on the ground that, the Act being passed for the primary benefit of the shippers, the principle of interference with vital interests of the State is inapplicable, and that the restraint upon suits by the Attorney General is but a means to the end of restraining the board as a whole in every way. If incidental merely, even criminal actions have been restrained. *Cf. Smyth* v. *Ames, supra; Prout* v. *Starr, supra; Cotting* v. *Kansas City etc.* (1901) 183 U. S. 79, 114. But beyond this criminal actions seem to be protected from the Federal Courts, both because of the lack of jurisdiction of equity in this respect and because the vital interest of the State in such proceedings interposes the bar of the Eleventh Amendment.

THE STATUS AND POWERS OF TERRITORIAL CONSTITUTIONAL CONVENTIONS. —The ablest jurists of our early national history seem to have had no doubt that the right of sovereignty vested in the people of the United States. Opinions of Jay, C. J. and Wilson, J. in *Chisholm* v. *Georgia* (1793) 2 Dall. 419, Chas. Pinkney's opinion quoted in 2 Hills at p. 57; John Randolph's opinion, Deb. Va. Conv. of 1829, p. 868; Story, Comm. on the Cons., Book 3, Chap. 3. A denial of this truth was the basis of the States' Rights Movement, Tucker, Lectures on Cons. Law, but the Civil War finally established the former view, which is now generally accepted. Cooley, Cons. Lim. 8; Burgess, Pol. Science & Cons. Law, 143, 145; Jameson, Cons. Conv. 30, 51. The Sovereign has merely delegated the exercise of certain powers to the central and State governments. Among those powers delegated to the central government is the power to govern the territories. Const. of U. S. Article 4, Sec. 3. If the whole sovereignty is in the people of the United

States there is none in the people of the territories, as has sometimes been claimed, Story Comm. on Cons., Sec. 1323 n. 3, and if all of the authority to exercise sovereign powers which are not reserved to the people of the United States is by the constitution vested in the central government, and in the States, then there is in the territories no inherent authority to even *exercise* sovereign powers. *Snow* v. *United States* (1873) 18 Wall. 317; *National Bank* v. *County of Yankton* (1879) 101 U. S. 129. Local control of territorial affairs is only exercised as a license from congress revocable at will, *National Bank* v. *County of Yankton, supra;* Bryce, Am. Comm., p. 210; *Territory* v. *Fee* (1874) 2 Mont. 124, and, therefore, any governmental function which is exercised must be authorized by the express terms, or necessarily implied terms of a statute of the United States.

The recent constitutional convention in Oklahoma called under a congressional Enabling Act inserted in the draft of the proposed constitution a provision for the division of Woods County into three counties, and by an ordinance provided that the election officials for the original county should act only for one of the new counties, and that election officials should be appointed for the other two as therein prescribed. The Enabling Act in terms authorized merely the drafting of a constitution and its submission for ratification, and specially provided that the election laws of Oklahoma as far as applicable and not in conflict with the Enabling Act should extend to the entire territory until the legislature of the future State should otherwise provide. Four conflicting opinions in a case arising under this ordinance are reported: Hainer, J., writing the majority opinion, declared the convention to be a sovereign body, and therefore authorized to legislate within its discretion. Burford, C. J., did not agree that the convention was sovereign, but thought that all it did was authorized by the Enabling Act; Burwell, J., decided that the convention was merely a deliberative body with power to submit to the people a constitution including provisions for changes in county lines, but without authority to legislate independently for the appointment of election officers; Erwin, J., agreed with Burwell, J., as to the character of the convention, and as to its lack of authority to legislate for the appointment of election officers, but also held that the provision for dividing Woods County was in conflict with a provision in the Enabling Act marking out certain congressional districts. *Frantz* v. *Autry,* (Okla. 1907) 91 Pac. 193. The discussion by the court of the propriety of inserting any given provision in the draft of the proposed constitution hardly seems profitable or proper, for admittedly the framing of a constitution is a convention's primary function, the abuse of which is doubly guarded against by provision for ratification by the people of the territory, and finally by the President, who is made the judge of whether the provisions of the Enabling Act have been complied with or not, and until so ratified, the constitution is not law so as to be properly justiciable, while upon ratification any defect in the action of the convention with regard to the constitution would be thereby cured, unless the new constitution violates some guarantee of the United States Constitution, which is clearly not the case here. The important question is as to the right of the convention by ordinances to make provision for the appointment of election officers not supplementary to, but in conflict with, existing election laws.

Even in the case of States, which are authorized by the people of the United States to exercise large sovereign powers, including that of legislation, it has been determined that constitutional conventions have no legislative powers except those expressly delegated, or necessarily impliable; *Quinlan* v. *Houston etc. Ry. Co.* (Tex. 1896) 34 S. W. 738; *Wells* v. *Bain* and *Wood's Appeal* (1874) 75 Pa. 39, 59; *Ex parte Birmingham etc. Ry. Co.* (Ala. 1905) 42 So. 118; Jameson, Const. Conv. Secs. 420 *et seq.*; 72 Amer. Dec. 78 n., for they are normally invested merely with deliberative powers. This is now well settled, although only after a struggle. Ill. St. Reg. of January 10 and 17, 1862; Deb. N. Y. Conv. 1821, p. 105; Deb. Ky. Conv. 1849, p. 863. It follows that in a territorial convention there resides no right to legislate, except as granted expressly or by necessary implication in the Enabling Act, since it has been shown that there is no source from which the rights to exercise sovereign powers in a territory may be drawn except from congress. If this be true, the question resolves itself into one of interpretation of the Enabling Act. Nowhere therein is there an express provision for such legislation as that indulged in by the convention. Legislative power in a convention is, as has been pointed out, an extraordinary power, and to authorize its exercise by implication, that implication should be clear and unquestioned. The differing opinions of the judges in the principal case show that it was not unquestioned, and upon examination of the act, the implication seems exceedingly doubtful. Admitting that the convention had authority to divide established counties, it does not follow that this division was to have any effect in actually creating a division before ratification. Nor, admitting that the provisions of the Enabling Act authorizing the election of officers at the same time as a submission of the constitution, authorized the recognition of the proposed divisions for the purposes of election, does it follow that authority must necessarily be implied therefrom to legislate for the appointment of election officers, for, as pointed out by Burwell, J., although it might be inconvenient for one set of officers to take charge of three sets of elections, it would not be impossible.

THE EFFECT OF THE RULE OF MUTUALITY OF EQUITABLE RELIEF ON SPECIFIC PERFORMANCE BY INJUNCTION.—The question has been rarely considered as to the availability of the defense of lack of mutuality to cases of specific performance by injunction. This form of relief has been granted on several theories; first, the relief is made to depend upon the same principles as those of specific performance; *Dills* v. *Doebler* (1892) 62 Conn. 366; *South Chicago Ry. Co.* v. *Ry. Co.* (1898) 171 Ill. 391; *Welty* v. *Jacobs* (1898) 171 Ill. 614; second, mere breach of an express negative covenant, regardless of other circumstances, is sufficient; *Donnell* v. *Bennett* (1883) L. R. 22 Ch. Div. 835; *Andrews* v. *Kingsbury* (1904) 212 Ill. 97; 7 COLUMBIA LAW REVIEW 204; third, the courts act upon the practical distinction between affirmative and negative relief, one compelling action, often not supervisable, the other compelling inaction, always supervisable. The rule often takes the form that if the relief "will do substantial justice between the parties by obliging the defendant either to carry out his contract or lose all benefit of the breach, and there is no reason of policy against it, the